SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1322

GENE BELCHER, Petitioner

V.

THE STATE OF ALABAMA, Respondent

PETITION FOR A WRIT OF CERTIORARI

To the Alabama Court of Criminal Appeals

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March 12, 1976

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INDEX

	Page
Opinions Below	1
Statement of Jurisdictional Grounds	2
Questions Presented for Review	2
Constitutional Provisions and Statutes Involved	3
Statement of the Case	5
How Questions Raised in State Courts	16
Reasons for Allowance of the Writ	19
I. Sufficiency of Evidence Question	19
II. Premature Trial Date Question	23
III. Presence, "Off Record" Question	28
IV. Seperation of Jury Question	33
Conclusion	37
Prayer	38
Proof of Service	39

INDEX TO APPENDIX

Number		Page
A	Opinion Sought To Be Reviewed	1a
B	Judgment of Trial Court	8a
C	Motion For New Trial	9a
D	Excerpts of "Off-Record" Proceedings	16a

TABLE OF AUTHORITIES

CASES:	Page
Berness v. State (1955), 263 Ala. 641, 83 So. 2d 613	30
Brown v. United States, 9 Cir. 314 F. 2d. 293	32
Chaney v. State, 56 So. 2d, 385, 36 Ala. App. 374	25
Christison v. State, 39 Ala. App. 361, 193 So. 2d 52	35
Edwards v. United States, 374 F. 2nd, 24	32
Edwards v. United States, 88 S. Ct. 48, 389 U.S. 850, 19 L. ed. 2nd 120	32
Fowler v. United States, 5 Cir. 310 F. 2d 66, Cf	32
Frost v. State 225 Ala. 232, 142 So. 427.....	27
Gideon v. Wainwright, 372 U.S. 335, 9 L ed. 2d 799, 83 S. Ct. 792, 93 ALR 2d 733	22
Gilchrist v. State, 27 Ala. App. 401, 173 So. 649	21
Heard v. State, 31 Ala. App. 290, 15 So. 2d 310 (1943) ..	23
Hopt v. Utah, 110 U.S., 574, 578, 4 S. Ct. 202, 28 L. ed. 262	26
Kelly v. State, 32 Ala. App. 408, 26 So. 2d 633 (1946) ..	30
Lakey v. State, 206 Ala. 180, 182, 89 So. 605	35
Lee v. State, 47 Ala. App. 548, 258 So. 2d 743	18, 34
Lee v. State, 31 Ala. App. 91, 13 So. 2d, 583, 586	25
Lee v. State, 13 So. 2d 583, 31 Ala. App. 91	26
Lee v. State, 13 So., 590	26
Leith v. State, 206 Ala. 439, 443, 444, 90 So. 687	35
Mitchell v. State, 244 Ala. 503, 14 So. 2d 132 (1943)	35
McCarty v. State, 35 Ala. App. 201, 45 So. (2d) 175 ..	11
McDaniel v. State, 97 Ala. 14, 12 So. 241	26
Neal v. State, 257 Ala. 496, 59 So. 2d 797 (1952)	30
Nelson v. State, 253 Ala. 246, 43 So. (2d) 892 (1950) ..	11, 35
Noell v. Com, 135 Va. 600, 115 S.E. 679, 681, 30, A.L.R. 1345, 1349, 1350	26
Oliver v. State, 232 Ala. 5, 166 So. 615 (1936)	35
Palmore v. State, 283 Ala. 501, 218 So. 2d 830	33
Parker v. State, 198 So. 261, 280 Ala. 685	22
Parrott v. United States, 10 Cir. 314 F. 2d 46	32
Pointer v. Texas, 380 U.S. 400, 13 L ed 2d 923, 85 S. Ct. 1065	22
Roan v. State, 225 Ala. 428, 143 So. 454 (26)	35
State v. Reed, 65 Mont. 51, 210 P. 756	26

BLEED THROUGH

TABLE OF AUTHORITIES Continued

CASES: Page

Smith v. State, 223 So. 2d 605, 45 Ala. App. 63 18
Smith v. State, 30 Ala. App. 501, 105 So. 2d 662 35
Smith v. State, 223 So. 2d 610, 284 Ala. 734 .....
Smith v. State, 20 Ala. App. 442, 102 So. 2d 733 24
Sylvester v. State, 71 Ala. 17 24
Terry v. State, 105 So. 386, 21 Ala. App. 100 30
Tidwell v. State, 37 Ala. App. 228, 66 So. 2d 845 (5), (6) 35
Townsend v. Sain, 83 S. Ct. 745, 372 U.S. 293, 9 L ed 2d 770 23
Whited v. State, 174 So. 545, 27 Ala. App. 466 18
Wright v. State, 38 Ala. App. 64, 70 So. 2d 66, 70 35
Young v. State, 39 Ala. 357 27

CONSTITUTIONAL PROVISIONS:

Constitution of the United States:

Page

Amendment V 2, 3
Amendment VI 2, 3
Amendment IX 2, 3
Amendment XIV 2, 3

Constitution of Alabama, 1901:
Article I, Section 6 ..... 2, 3
Article I, Section 13 ..... 2, 3

STATUTES:

Code of Alabama, 1940, Title 15, Section 316-317 . 2, 5
Code of Alabama, 1940, Title 13, Section 263 .... 3, 5
Code of Alabama, 1940, Title 15, Section 388 19

BLEED THROUGH

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Gene Belcher, the petitioner herein respectfully prays that a Writ of Certiorari issue to review the judgment of the Alabama Court of Criminal Appeals entered in the case of Gene Belcher v. State, Case No. 4 Div. 318, October Term, 1974-75, entered on March 18, 1975, affirming Judgment of Conviction entered by the Circuit Court of Barbour County, Alabama, Honorable Jack Wallace, Judge, in the case of State of Alabama v. Gene Belcher, No. 2147, by which Petitioner was sentenced to three years in the penitentiary for grand larceny.

Timely application was made to the Alabama Court of Criminal Appeals for rehearing, which application was denied on April 22, 1975 without opinion. Timely petition to the Supreme Court of Alabama for Writ of Certiorari was then made and granted on May 20, 1975 in Case No. S. C. 1271. On January 9, 1976 the Supreme Court of Alabama quashed the Writ without opinion "as being Improvidently Granted'.'

Petitioner then applied to The Alabama Court of Criminal Appeals for stay of execution to allow petitioner to file this petition for Writ of Certiorari before this Honorable Court. The stay was granted.

This petition is, therefore, timely filed, being within ninety days after entry of the judgment of a State Court of last resort, in compliance with Supreme Court Rule 22-1.

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals entered March 18, 1975 has been reported at 325 So. 2d 199, 295 Ala. App..... and is attached hereto as Appendix A. The docket Entry of Judgment of the Trial Court on March 4, 1974 is attached as Appendix B.

Judgment and Order of the Trial Court overruling Defendant's Motion of New Trial was entered on the 9th day of July, 1974.

The Order of the Alabama Supreme Court granting Writ of Certiorari to the Alabama Court of Criminal Appeals entered May 20, 1975 is noted at 325 So. 2d 195, 56 Ala. App.....

Order of the Alabama Supreme Court entered January 9, 1976, quashing the Writ is reported at 325 So. 2d 199, 56 Ala. App.....

The date of the judgment or decision sought to be reviewed, and each of the connected judgments, decisions and orders above referred to was the same as the time of entry indicated for each.

STATEMENT OF JURISDICTIONAL GROUNDS

The date of the judgment or decision sought to be reviewed, the time of its entry and the date of all orders respecting a rehearing are detailed in **Opinions Below,** supra. Jurisdiction to review the judgment or decision in question by Writ of Certiorari is conferred upon this Honorable Court by the Constitution of the United States, and particularly Amendment XIV, Section 1 thereof.

QUESTIONS PRESENTED FOR REVIEW

I

Whether the Alabama Criminal Court of Appeals erred in deciding, in substance, that the conviction of Defendant on surmise, speculation and suspicion should not be reversed, which decision contravenes Alabama Constitution of 1901, Article I, Section 6 and contravenes the Constitution of the United States, Amendments V, VI, XIV, Section 1.

II

Whether the Alabama Court of Criminal Appeals erred in deciding Defendant was not denied due process of law when the trial court, without Defendant's consent or knowledge, moved his trial date up from March 5, 1974, on which it had been set at his arraignment, to March 4, 1974, contrary to the requirements of: Title 15, Section 316, Code of

BLEED THROUGH

Alabama, 1940; Sections 6 and 13, Article I, Constitution of Alabama of 1901; and Constitution of the United States, Amendments V, VI, IX and XIV.

III

Whether the Alabama Criminal Court of Appeals erred in deciding that Defendant's right to be present throughout all the proceedings of his felony trial, his right to have trial proceedings stenographically reported as required by State statute, and his right to a complete record on appeal was violated when the trial court permitted proceedings on material questions to be conducted at the bench and out of the hearing of the Defendant and the official Court Reporter, contrary to: Code of Alabama, 1940, Title 13, Section 263; Sections 6 and 13, Constitution of Alabama, 1901; and Constitution of the United States, Amendments V, VI, IX, and XIV, Section 1.

IV

Whether the Alabama Criminal Court of Appeals denied Defendant's federally protected right to a fair trial, by an impartial jury, when it affirmed the trial court in allowing the jury to separate during Defendant's felony trial without the consent of the Defendant; and whether Defendant was denied equal protection of the law when State decisions require a new trial when Defendant shows such separation by written affidavit and the State fails to establish that jury was subjected to no influences which may have biased the deliberations of the jury.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I

Constitution of the United States, Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

II

Constitution of the United States, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the assistance of counsel for his defense."

Constitution of the United States, Amendment IX:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

IV

Constitution of the United States, Amendment XIV:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or proprety, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

V

Alabama Constitution of 1901, Section 6:

"That in all criminal prosecutions, the accused has a **right to be heard by himself and counsel,** or either; to demand the nature and cause of the accusation; and **to have a copy thereof; to be confronted by the witnesses against him;** to have compulsory process for obtaining witnesses in his favor; to testify in all cases, in his own behalf, if he elects so to do; and, in all prosecutions by indictment; and he shall not be compelled except by due process of law; . . ." (emphasis supplied)

XI

Alabama Constitution of 1901, Section 13:

"That all courts shall be **open;** and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remendy by due process of law; and right and justice shall be administered without sale, denial, or delay." (emphasis supplied)

BLEED THROUGH

VII

Code of Alabama, 1940, Title 15, Section 316:

"It is the duty of the clerk of the circuit court to set for trial all criminal cases in his court, except capital cases, and cases of parties in custody, for particular days; and **no case so set shall be called for trial before such day.**" (emphasis supplied)

VIII

Code of Alabama, 1940, Title 15, Section 317:

"No person shall be tried on an indictment presented by the grand jury until at least one entire day after the case has been placed upon the trial docket of the court, except with the consent of the defendant; but this section shall not apply to cases where an indictment has been quashed or demurrer sustained thereto and a new indictment for identical offense is returned on the same day."

IX

Code of Alabama, 1940, Title 13, Section 263:

(The official court reporter) "shall take full stenographic notes of the oral testimony and proceedings except the argument of Counsel and note the order in which all documentary evidence is introduced, all objections of Counsel, the rulings of the Court thereon, and exceptions taken or reserved thereto."

STATEMENT OF THE CASE

In the Circuit Court of Barbour County, Alabama, it was charged in a one count indictment that the Petitioner "feloniously took and carried away timber to-wit: saw logs a further description of same being unknown to the Grand Jury; being of the total and combined value of, to-wit: $500.00; the personal property of Guice Slawson . . .".

Slawson was General Manager of Mid-Way Lumber Company, Inc., Louisville, Alabama and was also Mayor of Louisville.

For consistency in this Statement of the Case, we will

hereafter refer to the petitioner as "Defendant" and, in compliance with Supreme Court Rule 23 (f) specific reference to the places in the record of the trial where the matter bearing on this petition appears will be designated parenthetically by the page number of the trial transcript, e. g. (TR 1).

Also, Defendant was granted Certiorari to Correct the Record by the Alabama Court of Appeals directed to the trial court and when reference is here made to that portion of the record in response to that Writ, the record will be designated for brevity as "Return", followed by the page number.

On February 13, 1974, Defendant was arraigned, entered a plea of not guilty, and his trial was set for March 5, 1974 by Hon. Jack W. Wallace, Judge, Third Judicial Circuit of Alabama (Barbour County): Bench note on Arraignment, (Return, front unnumbered page).

On March 4, 1974, having cleared his docket of a preceding matter, Judge Wallace decided to commence with Defendant's trial a day early. The trial was commenced and concluded that day.

No voir dire examination of the venire was reported, the Official Court Reporter merely noting "the jury was duly qualified, selected and sworn" (TR 12). Casual reading of the trial transcript reflects that Defendant was not afforded rudimentary trial procedures. For example, an unsworn letter from a witness was received in evidence (TR 14, 15) and Defendant was cross-examined regarding some returned checks (TR 77, 78, 83) which he paid off after warrants had been issued against him. There was no proof of any **conviction** of a crime involving moral turpitude, which would have been admissable under Alabama law as going to the credibility of the witness.

Unfortunately, trial counsel did not adequately protect his client against this lack of confrontation nor the prejudicial effect of the insufficient funds admissions.

However, the questions raised in this petition were prop-

BLEED THROUGH

erly raised and presented in all three State Courts. They were **written to and decided** by the Alabama Court of Criminal Appeals, speaking through Judge De Carlo.

In the trial court, Defendant moved to exclude the evidence and for an acquittal at the close of the State's case (TR 47), insisting that the State had failed to prove the offense alleged in the indictment.

Only two witnesses tended to incriminate Defendant. First was Guice Slawson, named in the indictment as the owner of the allegedly stolen timber or saw logs. He stated that the owner was actually Mid-Way Lumber, Inc. of which he was an officer and stockholder, there being two other major stockholders. (TR 13) In December, 1973, Slawson engaged Defendant as an independent contractor to cut some timber from the land of Mrs. Catherine Davis, which timber she had contracted to sell to Mid-Way Lumber Company, Inc. (TR 13). Under his agreement with Defendant, all saw logs for lumber was to be hauled to the mill of Mid-Way Lumber Company in Louisville. Defendant could take all timber fit for pulpwood only and sell it to anyone Defendant chose (TR 58). Slawson claimed he became suspicious of Defendant because "the timber wasn't turning out like it was suppose to . . ." and on January 26, 1974 he noticed a pile of logs outside of Defendant's father's house. He first contended that he "recognized the logs as being some that came off the place . . ." (TR 18). But on cross-examination he admitted that his conclusion was speculative; that the logs had no distinguishing marks or brands or identification numbers. In response to the question, "In other words, you can go out in anybody's woods and look at trees and then go to the sawmill and you can tell this particular tree came off that place; is that correct? I mean you say you recognized the logs . . ." Slawson answered, "Well, I'm not perfect; no, Sir." (TR 22)

Next (TR 23) came the following colloquy:

"Q. All right. How did you recognize these logs as coming off the Davis' place if you are not perfect?

A. They were very similar in appearance to the logs that he was unloading.

Q. Similar. But, you said you recognized them. Could you swear — absolutely swear in this court room that you know these logs that were beside his father's place were the same ones that came off the Davis' place?

A. No, sir.

Q. You can't swear to that?

A. No, sir."

The only other evidence tending to prove the charge was the testimony of one Charles Wayne Arrington. Called during the forenoon by the State he testified that during the four weeks he worked for Defendant in December 1973 and January 1974, he remembered once being asked to haul timber from "a place back of Hubert Tyler's store" to Defendant's father's place. He told Defendant he wouldn't do so and Defendant drove the load of logs himself with Arrington getting out of the truck in Clio (TR 33). Arrington admitted on cross-examination having signed a prior contradictory statement (TR 55) after which Slawson had told him he would "get paid for coming to Court" (TR 36).

Following recess for the noon hour, Arrington changed his story and said he did ride with Defendant all the way to Defendant's father's house with a load of timber. Thereupon the following colloquy took place. (TR 54)

"Q You were riding wtih Gene?

A. Right.

Q How many logs did you carry down there?

A. I don't know how many.

Q Well, was it a truck load?

A. It wasn't loaded good full.

Q And where did you get these logs?

A. He got them from back of Hubert's house.

BLEED THROUGH

Q Was it pulpwood?

A. **I didn't pay no attention to whether it was pulpwood or logs. I suspect** it was logs.

THE COURT: What kind of pulpwood did you cut? Short pulpwood or long?

WITNESS: Long."

Arrington repeated that he did not haul any logs from the Davis place; that all logs belonging to Guice Slawson were hauled to his mill at Louisville and that he hauled only pulpwood to Abbeville. (TR 51)

A letter from Jones-Reynolds Lumber Company of Abbeville was received in evidence, reciting that from December 28, 1973, to January 18, 1974, Defendant had sold saw logs as well as pulpwood to that Company.

The materiality of this letter was not shown, since it was the contention of Slawson that he saw the logs he suspected Defendant of stealing from him piled at Defendant's father's house on January 26, 1974, much later than the last transaction mentioned in the Jones-Reynolds Lumber Company letter.

There was no other evidence tending to prove Defendant stole the logs described in the indictment and the trial judge denied the defense motion to exclude even though there was no proof of the charge except Slawson's speculative identity of logs to which he admittedly could not swear and the uncorroborated suspicion of Arrington, a self proclaimed accomplice, that what Defendant hauled to his father's house were logs instead of long-cut pulpwood.

Long-cut pulpwood and saw logs differ from each other only in girth. Both are cut from the same species of timber, and to the same length, this being controlled by the height of the tree and the length of the trailer used to transport them. In other words, long-cut pulpwood is similar in appearance to saw logs which are small in circumference. The dividing line between the two is a matter of judgment, usually exercised by the cutter or the miller.

Defendant accounted for the presence of the logs stacked at his father's house by testifying that he had cut them from his father's land, (TR 64), and steadfastly maintained his innocence. It was also his uncontradicted testimony that he had cut for several other timber owners during the time frame in question and that all he had ever hauled off the Davis place to his home on his father's place had been long-cut pulpwood. It was without dispute that he had the right to do this with the pulpwood.

In summary, the only evidence tending to prove the indictment was the testimony of Slawson, that he had seen some logs stacked near the home of Defendant's father, which logs were similar in appearance to those cut from the Davis place. He could not swear they were the same. The testimony of the Witness Arrington was merely that he had helped Defendant haul a load of timber from near Hubert Tyler's store, but he had not closely observed the timber to determine whether it was pulpwood or logs. Moreover, he was by his own lips a perjurer and discredited accomplice.

As Judge De Carlo wrote for the Alabama Criminal Court of Appeals, "when defense counsel specifically asked if the load was pulpwood, Arrington replied, 'I didn't pay no attention as to whether it was pulpwood or logs. I suspect it was logs'."

In short, there was no evidence that any logs had actually been stolen from Slawson, and even if there had been, there was no evidence that Defendan stole them, except the suspicion and conjecture of Slawson and Arrington.

Notwithstanding, the trial court overruled Defendant's motion to exclude the State's evidence (TR 47) and was affirmed in this ruling by the Alabama Court of Criminal Appeals (Appendix A).

Defendant filed a motion for new trial (TR 5-8) copy of which is attached as Appendix C.

He assigned as grounds for new trial, inter alia, the following:

BLEED THROUGH

"3. For that Defendant was denied due process of law and equal protection of the law under the Constitutions of the State of Alabama and the United States of America in this: he was arraigned on February 13, 1974, at which time his case was set for trial on March 5, 1974, but notwithstanding, his trial was called before such day, and prior to Defendant having completed his preparation for said trial and Defendant was deprived of the time allowed at his arraignment for the preparation of said trial, to his detriment.

***

9. For that the Defendant was not present in Court when an Order was made fixing the date for his trial.

10. For that no copy of the indictment was served on Defendant.

11. For that the Defendant was denied due process of law and equal protection of the laws under the statutes and constitutions of the State of Alabama and of the United States of America in that he was not served with a copy of the indictment.

12. For that the Defendant was denied due process of law and equal protection of the laws under the statutes and constitutions of the State of Alabama and of the United States of America in that he was not present in Court when his case was set for trial on the date the trial was actually held.

***

14. For that the jury was allowed to separate during the trial: **McCarty vs. State,** 35 Ala. App. 201, 45 So. (2d) 175.

15. For that the jury was allowed to separate during the trial without the consent of the Defendant: **Nelson vs. State** 253 Ala. 246, 43 So. (2d) 892.

16. For that it was error for the Court to allow and receive in evidence State's Exhibit No. 1, a letter from Ralph Reynolds, as direct evidence of the matters and things set out therein, without the appearance of the said Ralph Reynolds as a witness.

***

19. For that it was a denial of due process, equal protection of the law, a fair and impartial trial, and the right to be confronted by the witnesses against him, as guaranteed to the Defendant by the laws and constitutions of the State of Alabama and the United States of America to receive in evidence said Exhibit No. 1, and allow the jury to consider the same, and the witness Guice Slawson, to testify as to his interpretation thereof.

***

22. For that the allegations of the Complaint are not sustained by the proof.

***

24. For that it was error to fail to grant Defendant's motion to exclude the evidence.

25. For that it was error to allow the case to go to the jury on the uncorroborated testimony of an alleged accomplice.

***

27. For that it was error to allow the case to go to the jury when the offense alleged in the indictment had not been proven.

***

29. For that it was prejudicial error for the prosecution to cross-examine the Defendant with reference to alleged convictions of worthless checks without any proper predicate having been laid, and without showing that the alleged convictions, and each of them, were for a crime involving moral turpitude.

***

31. For that it was error to charge the jury with reference to offenses involving moral turpitude or prior felonies allegedly committed by the Defendant when there was no proof that the Defendant had in fact committed any prior felony.

***

33. For that it was error for the Court to conduct or

BLEED THROUGH

permit to be conducted parts of the trial out of the hearing of the Court Reporter, and without requiring the Court Reporter to listen to and report the same.

34. For that it was error for the Court to allow part of the trial to be conducted out of the hearing of the Defendant and the Court Reporter and without requiring the Court Reporter to listen to and report the same.

35. For that it was a denial to the Defendant of a fair trial, due process and equal protection of the law, as guaranteed to him by the laws and constitutions of the State of Alabama and the United States of America for the Court to conduct parts of the trial out of the hearing of the Defendant and the Court Reporter and without requiring the Court Reporter to report the same.

The motion for new trial was overruled on July 9, 1974 by the trial judge after an evidentuary hearing during which the trial judge took testimony from the twelve jurors participating in Appellant's trial.

On the hearing of the motion for new trial the trial judge elicited, by leading questions and over defendant's objection, testimony from ten of the jurors that they did not discuss the case with anyone during their separation.

But several of the jurors testified that they **could not remember** whether they discussed the case during the separation, and all admitted opportunity for their being subjected to improper influence.

The inability of the juror, Mrs. Betty Pugh, to remember becomes more meaningful when it is considered that she knew Slawson, had known him ever since his marriage to Caroline Daniel, that she saw him during the separation in the Courtroom (Return, 3) and the trial judge refused to allow Defendant to inquire into details of her friendship with Slawson, to which the Defendant duly excepted (Return 5). This ruling also precluded the Defendant from inquiring into Slawson's relationship to the jurors husband, with whom she had lunch.

This limitation on cross-examination, extended to cross-

examination of the jurors, was particularly hurtful in view of the fact that most of the jurors had known Slawson for many years, together with his wife Caroline Daniel. Mrs. Daniel is the daughter of Frank Daniel, who the record showed to be, with Slawson, one of three stockholders in Midway Lumber Company, Inc., actual owner of the allegedly stolen logs.

Juror Mrs. Mary Bowden said she knew Slawson "casually" and that she knew Mrs. Slawson. (Page 9, The Return) Robert F. Beatty, Jr. said he has known Slawson for around ten years and Slawson is a customer of his business. (Return, page 12) Odell Dykes said that he had known Slawson for "a pretty good while"; that he, the juror, had lunch at the B and S Cafe and was sure he saw some of the other jurors there; that he didn't know whether he talked to them; that he couldn't swear to what conversation was had with them; that he talked with the owner of the cafe but he didn't recall what their conversation was about; that after leaving the cafe he went back to the Courthouse and went to the office of the District Attorney; that at least one other juror came into the District Attorney's office; that he remained there fifteen or twenty minutes; that he had a conversation with the District Attorney's secretary; that he wasn't sure whether he saw Slawson during the separation; (Return, pages 13-16).

Marvin Greathouse under the leading of the trial judge (over the objection of Defendant) testified that he did not hear anyone discussing the case during the lunch break. On cross-examination he testified that they did not take a lunch break, or if they did, he didn't recollect it; that he knew the family of Slawson's wife and had known them for twenty or twenty-five years. (Return, pages 16-19).

James E. Hendrix testified that he went home for lunch; arrived back in the Courtroom before the judge did; some of the other jurors were there along with a number of people including lawyers and witnesses in the case; and they were all congregating there together talking. He said he had known Slawson for five or six years and had known his wife for about ten years. She taught his children in school. (Return, pages 21-23)

BLEED THROUGH

Sid C. Hightower testified that he could not remember where he had lunch; that he was in an accident about a year ago "and it has affected my memory on specific things"; that he had known Slawson "since high school days" and that he had "known his daddy a long time". (Return, pages 25-26)

Jack Jenkins testified that when he returned from lunch he went back in the Courtroom about ten minutes before Court reconvened, where he saw other jurors congregated and later on before Court started again the lawyers came in. The jurors and the others there in the Courtroom were "just short of mixing and milling with each other"; that he had known Slawson for fifteen or twenty years; (Return, pages 28, 29)

As noted by the Alabama Court of Appeals in its decision, the juror William H. Lindsay testified that he could not remember talking with anyone about the case. In its opinion, the Appellate Court said this information came on cross-examination but actually it was first in response to a question put by the Judge (Return, page 30). In fact, this juror denied having separated for a lunch period "that I remember". The trial judge then lead him through an hypothesis that the case was not discussed at any time any separation **may** have occurred and the witness still answered **"not that I remember, Judge".**

On cross-examination the **Clerk** and District Attorney tried to get the witness to recall that he had served on two cases, and finally the juror stated that he did serve on two cases on the same day but he maintained that he did not go out for supper on either of the cases, just went out for lunch, and that the jury all went together. There was discussion all around the table as the jury sat together, but he couldn't remember anything specific that was discussed. (Return, page 32)

The entire testimony of this witness refutes the finding of the Court of Appeals that **each** juror testified no one spoke to him about the case. The best that can be said for the

State in meeting its burden with this juror is that he testified only that he could not remember.

Tom Livingston testified that when he returned from lunch at his home he took his seat in the Courtroom where the audience usually sits, saw a number of the other jurors that had gotton back, that the Judge was not present, that some of the lawyers might have been, as were some of the witnesses. The jurors and other people that were in the Courtroom were just mixing and milling with one another and there were conversations going on in which he did not participate. (Return, page 35)

How Questions Raised In State Courts

The record sub judice presents a classic travesty, wherein the weak and friendless fall victim to the popular and the powerful in the very place where the rights of all men should be equally protected. Defendant Belcher was compelled to beseech justice from his accuser's many friends on the jury. He was perhaps doomed from the beginning, represented as he was by inept counsel, and prosecuted not only by an astute district attorney aided by his capable deputy, but by a special prosecutor as well, hired by his accuser. This was a case that should have commanded the careful scrutiny of the trial judge, to the end that the truth be ascertained, regardless of the disparity between the parties.

Such care was not forthcoming. Instead, the trial judge interrupted Defendant's trial preparation by hauling him into court a day earlier than that fixed at his arraignment, in violation not only of the statutes and Constitution of Alabama, but the mandates of the United States Constitution as well. The trial judge then not only allowed into evidence an unsworn letter, without any semblence of confrontation, but ignored the fact that the claimed accomplice Arrington, in this very trial a self-confessed perjurer, admitted changing his written pre-trial statement after **Slawson** had promised him he would "get paid for coming to court".

The trial judge also failed to see to the court reporter recording the voir dire examination of the jury, and twice

BLEED THROUGH

permitted vital proceedings to be conducted out of the hearing of the Court Reporter and the Defendant. (TR 38, 51-53) In each instance, a material objection was before the trial judge, and apparently ruled on adversely to Defendant in these "off the record" bench conferences. Excerpts from the trial transcript are annexed as Appendix "D". Please note that in Appendix D Defendant was cross-examining State's witness Arrington as to the previous conflicting written statement given by him, and asked "Now, did you also say on that day that Guice (Slawson) told me that he would pay me for . . .'."

At this juncture, the special prosecutor interposed an objection, and the trial judge said "Let's see it" (the statement), the attorneys went into a huddle at the bench, and the court reporter noted:

"WHEREUPON, a short discussion was held at the Bench **between counsel and the Court** out of the hearing of the Court Reporter and was not reported."

After this "short discussion" no more questions were put to the witness Arrington and his statement was not received in evidence. In the afternoon, Arrington was recalled by the Defense in a further effort to get his prior statement into evidence. Although the witness admitted giving the contradictory statement, and identified it, the special prosecutor objected to it being admitted into evidence, and again the objection was disposed of in an "off the record" proceeding at the bench, out of the hearing of Defendant and the Court Reporter. The ruling of the Court was not recorded, but the statement was not admitted. See TR 51-53, Appendix "D".

Thus thwarted in his effort to impeach the State's chief witness by his own contradictory statement, Defendant was left to the tender mercies of Slawson's friends on the jury, who were not sequestered from Slawson and his supporters, but were allowed free reign to "mix and mill" with him during the trial. Neither the fact that his own witness had testified that Slawson had promised the witness money, nor the fact

that Defendant did not consent to the seperation of the jury were taken into account.

As we have pointed out, Question Presented for Review number I was raised in the trial court by motion to exclude the evidence, made when the State rested its case (TR 47). This is a proper method of testing the sufficiency of the evidence in Alabama, and amounts to requesting a directed verdict of acquital: **Smith v. State,** 223 So. 2d 605, 45 Ala. App. 63, certiorari denied, 223 So. 2d 610, 284 Ala. 734; **Whited v. State,** 174 So. 545, 27 Ala. App. 466. The question was also raised on motion for new trial: grounds 22, 24, 25, Appendix C, infra (TR 7). The Alabama Court of Criminal Appeals wrote to the question (Appendix A, infra) holding "there **appears** to have been **factual issues** from which a jury could **infer** larceny". (Emphasis Defendant's)

Question II Presented for Review (Premature Trial Date) was raised in the trial court by motion for new trial: grounds 3, 9-12, Appendix C, infra (TR 5). The Alabama Court of Criminal Appeals wrote to the question, saying Defendant waived the "irregularity". (Appendix "A", infra)

Question III Presented for Review (right of Defendant to be present (hear) at his trial and to have the proceedings stenographically recorded was also raised on motion for new trial (grounds 33-35, Appendix "C", infra, (TR 7). The Alabama Court of Criminal Appeals held this waived: Appendix "A", infra.

Question Presented For Review IV, (seperation of jury without Defendant's consent) was raised on motion for new trial: grounds 14, 15, and 19, Appendix "C", infra, (TR 6). The motion was supported by Defendant's affidavit, which is the prescribed manner of presenting the question in Alabama, and places upon the State the burden of affirmitively establishing that no juror was subject to influence or contacts that **might** have **swayed** the juror in reaching the verdict: **Lee v. State,** 47 Ala. App. 548, 258 So. 2d 743. The Alabama Court of Criminal Appeals, in writing to this point, conceded that "two of the jurors said they did not **remember** discussing the case with anyone" but nevertheless held "the state did

BLEED THROUGH

meet its required burden". (Emphasis supplied) (Appendix "A")

As we have pointed out, supra, Defendant made timely application for rehearing and from adverse ruling timely presented his petition to the Alabama Supreme Court for Writ of Certiorari. The Writ was granted, and then quashed, without opinion. The Alabama Court of Criminal Appeals has final jurisdiction, and mandate remains there pending the filing of the instant petition. Defendant has therefore exhausted his state remedies, and the instant petition is to review the judgment "of a state court of last resort" within the meaning of Supreme Court Rule 22-1.

We should perhaps point out that Alabama no longer requires assignment of error on criminal appeals. Code of Alabama, 1940, Title 15 Sec. 388 provides, inter alia, "In cases taken to the supreme court or court of appeals under the provisions of this chapter, no assignment of errors is necessary; but the court must consider all questions apparent on the record . . ."

REASONS FOR ALLOWANCE OF THE WRIT

I

The Alabama Criminal Court of Appeals erred in deciding, in substance, that the conviction of Defendant on surmise, speculation and suspicion should not be reversed, which decision contravenes Alabama Constitution of 1901, Article I, Section 6 and contravenes the Constitution of the United States, Amendments V, VI, XIV, Section 1.

The State not only failed to prove that Defendant stole any **saw** logs from Guice Slawson as alleged but it even failed to prove that any such logs were **stolen at all.**

Slawson testified that he hired Defendant to cut some timber on what was referred to as "The Davis Place" and that he became suspicious because "the timber wasn't turning out like it was supposed to, and, of course, I was aware of it but I couldn't put my finger on it . . ." (TR 18)

Slawson testified that one day on his way to Brundidge

he passed by the house of Defendant's father, where he saw a pile of logs, mostly concealed by the house, but which he nevertheless estimated to contain approximately five thousand feet. He stated that these were **similar** to the timber from the Tyler place but on cross-examination he admitted he was not perfectly certain in his recognition of the logs. (TR 22) and that he could not swear that the logs he saw beside the place of Defendant's father were the same ones that came off the Davis place (TR 23).

There was evidence that the witness Arrington rode with Defendant hauling some pulpwood or logs from the Davis place to the home of Defendant's father. However, as pointed out by the Court of Appeals (Appendix A), when defense counsel specifically asked if the load was pulpwood, Arrington replied, **"I didn't pay no attention** to whether it was pulpwood or logs. I **suspect** it was logs". (Emphasis supplied)

The materiality of whether the load was pulpwood or logs is this: It is admitted by Slawson that Defendant had the right to cut and take pulpwood from the Davis place and sell it to whomever he chose, (TR 28) including Pope-Jones Lumber Company also known as Jones-Reynolds Lumber Company of Abbeville.

The State introduced an undated letter addressed to Slawson from Jones-Reynolds Lumber Company listing purchases of logs and pulpwood from Appellant (TR 15).

The materiality of this letter was never made to appear, for it does not match the quantity of the logs Slawson said he saw piled behind the house of Defendant's father, the last sale listed in the letter is on January 18, 1974 and Slawson said he saw the logs by the house of Defendant's father on January 26, 1974 (TR 16, 18).

The timber Arrington said he helped haul to the house of Defendant's father was never identified as logs by anything stronger than a suspicion. It should be noted, at this point, that the pulpwood being cut by Defendant, which he had a right to take and sell to others than Slawson, was "long-cut", as the trial judge himself brought out by question-

BLEED THROUGH

ing. (TR 54) "Long-cut" pulpwood is that which is long enough to be hauled on a trailer truck like other logs, and has the same appearance as saw logs, except for smaller girth. Therefore, except for Arrington's **suspicion** there is no proof of any kind in the record that Defendant and Arrington hauled **any saw** logs from the Davis place.

Moreover, Arrington only worked for Defendant for four or five weeks in December, 1974. He quit the week after Christmas, 1974 (TR 48). This shows up the inconsistency of the State's theory that on or about January 26, 1974 Defendant, **with Arrington's help,** had five thousand feet of Slawson's timber located at the house of the Defendant's father which Arrington helped place there, and which Defendant later sold to Jones-Reynolds Lumber Company.

The State's evidence shows that the Defendant did not sell any logs to Jones-Reynolds after January 18, 1974 and on January 26, 1974 Arrington had not been in his employ for nearly a month.

The Defendant denied stealing any logs from Slawson, and accounted for those ramped by his father's house. He was nevertheless convicted, and it is not so difficult to understand why when consideration is given the prejudicial matters contained in the record which were bound to have biased the jury against him and in favor of their acquaintance, Slawson. Much prejudicial matter was admitted without objection by trial counsel. Earlier Courts of Appeal in Alabama have been known to adopt the humane attitude that the Court is under a duty to reverse a verdict which the record shows is wrong and unjust, even though error may not have been preserved due to inadequate counsel, or no representation at all: **Gilchrist v. State,** 27 Ala. App. 401, 173 So. 649.

But the problem here is: Was there sufficient proof to go to the jury on the questions of whether the logs described in the indictment were stolen, and if so, was the guilty agency or Defendant established? We repeat: the record under consideration shows not, and the Alabama Criminal Court of Appeals erred in holding that "there appears to have been

factual issues from which a jury could **infer** larceny". (Emphasis supplied)

This decision is in conflict with a prior decision of the Supreme Court of Alabama on the same point of law, viz: **Parker v. State,** 198 So. 261, 280 Ala. 685. We quote at page 692:

> "(14) The only inference raised by the State's evidence presented in this case is that it was **possible** that this appellant may have committed this offense. Beyond this possibility, resort must be had to surmise, speculation, and suspicion to establish the appellant's criminal agency in the offense charged. No rule is more fundamental or better settled than that convictions cannot be predicated on such bases. See 6 Ala. Digest, Criminal Law, 560 . . .
>
> (15) If the evidence in a criminal case raises a mere suspicion, or, admitting all it tends to prove, a defendant's guilt is left in uncertainty, or dependent upon conjecture or probability, the court should instruct the jury to acquit, for such evidence does not overcome, prima facie, the presumption of innocence with which every accused is charitably clothed under our system of jurisprudence." (Emphasis supplied)

Conviction of Defendant was clearly based on speculation and conjecture. The witnesses for the State say so in their own words. Such a conviction denies Defendant due process and equal protection of the principles enounced in **Parker v. State,** supra, in contravention of the Constitution of the United Stated, Amendments V, VI, XIV, Section 1 and Alabama Constitution of 1901, Article I, Section 6.

It is well settled that "a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the States by the Fourteenth Amendment": **Gideon v. Wainwright,** 372 U. S. 335, 9 L ed 2d 799, 83 S Ct. 792, 93 ALR 2d 733; **Pointer v. Texas,** 380 U. S. 400, 13 L ed 2d 923, 85 S. Ct. 1065.

BLEED THROUGH

In **Townsend v. Sain,** 83 S. Ct. 745, 372 U. S. 293, 9 L. ed. 2d 770, we are reminded:

> "This Court has consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights . . . where the fundamental liberties of the person are claimed to have been infringed, we carefully scrutinize the state-court record . . . Even if all the relevant facts were presented in the state-court hearing, it may be that the fact finding procedure there employed was not adequate for reaching reasonably correct results. If the state trial judge has made serious procedural errors . . . in such things as the burden of proof a **federal hearing is required."**

True, this Court was directing the federal district courts as to habeas corpus proceedings in **Sain,** but surely the Court has set no more exacting rules for the districts than it is willing to apply itself in a case properly before it. Alabama should not be permitted to take the liberty of the weak and impoverished citizen on the complaint of the strong and wealthy with any more ease than it could if the positions were reversed. This compelling reason alone should suffice for granting the Writ.

II

The Alabama Court of Criminal Appeals erred in deciding Defendant was not denied due process of law when the trial court, without Defendant's consent or knowledge, moved his trial date up from March 5, 1974, on which it had been set at his arraignment, to March 4, 1974, contrary to the requirements of: Title 15, Section 316, Code of Alabama, 1940; Sections 6 and 13, Article I, Constitution of Alabama of 1901; and Constitution of the United States, Amendments V, VI, IX and XIV.

Where the time for trial of a criminal cause is prescribed by statute, compliance must be had therewith in order to afford due process of law. Title 15, Sec. 316, Code of Alabama 1940 (Recompiled 1958); **Heard v. State,** 31 Ala. App. 290,

15 So. 2d 310 (1943); **Smith vs. State,** 20 Ala. App. 442, 102 So. 2d 733.

Tit. 15, Sec. 216, Code of Alabama, supra provides as follows:

> "It is the duty of the Clerk of the Circuit Court to set for trial all criminal cases in his Court, except capital cases, and cases of parties in custody, for particular days; and **no case so set shall be called for trial before such day."**

Obviously, the first portion of this Code Section prescribes a ministerial duty of the Clerk, and may be said to be directory only. However, the underscored portion goes beyond the ministerial duty of the Clerk, and reaches to the actions of the trial Judge. In no uncertain language it is stated that "no case so set shall be called for trial before such date." The setting of cases is the function of the Clerk but the calling of cases for trial requires the authority of the Court. Clearly, it is the legislative mandate that the Court shall call no case for trial before the date on which it has been regularly set at arraignment, absent a showing of consent by Defendant.

The record does not reflect any consent by Defendant for the change of trial date from March 5th to March 4th; nor does it reflect his presence in Court at the time the trial date was changed from March 5th to March 4th. In fact, the Defendant did not consent to such change and was simply called and put to trial without hearing on an order changing the date. In a capital case, Alabama courts have held his presence for such an **order** would be **absolutely required: Sylvester v. State,** 71 Ala. 17, and if his trial date is ordered moved up so as to shorten the time of which he previously received notice on arraignment, elementary requirements of due process would make his presence necessary at the time of such an order.

Tit. 15, Sec. 316 and 317, Code of Alabama, 1940 (Recompiled 1958) were construed as being mandatory by the Court of Appeals in **Heard v. State,** supra. While dealing primarily with the interpretation of Sec. 317, Justice Bricken in writing the opinion for the court set out verbatim Sec.

BLEED THROUGH

316 and Sec. 317 and then said: ". . . We have no authority to emasculate the statute; it is our duty to apply and enforce it, and we must hold reversible error was committed by the lower court in ruling contrary thereto". Tit. 15, Sec. 317, supra, provides that no person shall be tried on an indictment presented by the grand jury until at least one entire day after the case has been placed upon the trial docket of the court, except with the consent of the Defendant, and this was the specific section which concerned the court in **Heard v. State,** supra. However, the court's construction clearly applies to both Sec. 316 and 317. Obviously the two sections are equally important, and equally mandatory. The right to be tried on the day set upon arraignment in open court and not before, and the right not to be tried until at least one day after the case has been set on the trial docket are fundamental rights of an accused in Alabama provided by the legislature and are a fundamental part of our due process of law in criminal cases. Tit. 15, Sec. 316, supra, is not only concerned with the fundamental rights of the defendant, but the public is entitled to know when trials are to be held and to protect this interest, the statutes require that cases be set on the docket in a certain way and that the trials be had on the day or term set. If it were otherwise the public would not know the date of trials, and Constitutional requirements for public trials could in effect be nullified.

It is clear from the record that the Court changed the trial date without the presence of and notice to the Defendant and this change being a fundamental part of the trial proceedings the defendant's presence was required. The failure to have him present constituted error, and violates both state and federal organic law.

Necessity for the presence of Defendant has been recognized in other cases in Alabama. In **Chaney v. State,** 56 So. 2d, 385, 36 Ala. App. 374, we find "The following excerpt from a scholarly opinion by Simpson, J., in **Lee v. State,** 31 Ala. App. 91, 13 So. 2d 583, 586, certiorari denied 244 Ala. 401, 13 So. 2d 590, will we think, illustrate the applicable doctrine which compels a reversal of this case because of the

above mentioned irregularities in the trial below:

> 'Erudite discussion of the rule is found in the case of Noell v. Com. 135 Va. 600, 115 S.E. 679, 681, 30 A.L.R. 1345, 1349, 1350. We trust the importance of the question justifies further illustration and the following quotation therefrom, to-wit: 'That principle did not spring solely from a regard for the welfare of the accused. The public has an interest in every case involving the life or liberty of a citizen, and both in England and in this country it has long been recognized as a settled rule of the common law, based as well upon public policy as upon the interest of the accused, that his continuous presence, from arraignment to sentence, is an essential part of the process of law provided for his trial and without which the courts have no jurisdiction to pronounce judgment upon him. Constitutional provisions and statutory enactments not in conflict with such provisions may modify or abrogate this general rule. But in the absence of constitutional or statutory change—and there is none as to felony cases in Virginia (nor in Alabama)—conformity to the rule is essential to jurisdiction, **and the accused cannot waive it.'**

See also Hopt v. Utah, 110 U. S. 574, 578, 4 S. Ct. 202, 28 L. Ed. 262; Lewis v. United States, 146 U. S. 370, 371, 372, 13 S. Ct. 136, 36 L. Ed. 1011; State v. Reed, 65 Mont. 51, 210 P. 756.' " (Emphasis supplied)

Neither the Alabama Supreme Court or the Court of Criminal Appeals explained its failure to enforce Belcher's right which had been protected to Chaney. Judge De Carlo brushed the question aside saying it was waived, basing his conclusion on **McDaniel v. State,** 97 Ala. 14, 12 So. 241. **McDaniel** was decided in 1893, and did not treat the Constitutional questions involved. Also, **McDaniel** does not inform us as to what the "irregularity in setting this cause down to trial" consisted of. It may have been purely procedural, not raising the Constitutional question here presented. Chaney was decided in 1952. Moreover, **Lee v. State,** 13 So. 2d 583, 31 Ala. App. 91, which Chaney follows, was decided

BLEED THROUGH

in 1952. Both **Chaney** and **Lee** were decided by the Court of Appeals of Alabama, but the Alabama Supreme Court denied certiorari in **Lee v. State,** 13 So. 590. Clearly it was the law in Alabama, prior to the decision herein complained of, as stated in **Lee v. State,** supra:

> "The record must affirmatively show the prisoner's presence at each successive step in the trial. Young v. State, 39 Ala. 357; Frost v. State, 225 Ala. 232, 142 So. 427."

Even during the years it tolerated slavery, Alabama recognized the necessity of it affirmitively appearing from the record that the Defendant was present at all stages of his felony trial. In **Frost v. State,** supra, it was said:

> "In the case of Eliza (a freed woman) v. State, 39 Ala. 693, it was said: "In looking into the record in this case, we find a fatal error, which must reverse the judgment below. In the judgment-entry, it does not sufficiently appear that the prisoner was personally present in court, when she was tried and sentenced. The entry recites that 'this day came S. A. M. Wood, solicitor, and the defendant,' etc; and it also recites, 'that she be taken hence to the jail of Tuskaloosa county,' etc. These recitals are not sufficient to make it affirmatively appear that the prisoner was present **in** person, both during the trial, and at the time of the sentence. The rule is well settled, in England, and in this state, and is inflexible, that a prisoner, accused of a felony, must be arraigned in person, and must plead in person; and in all the subsequent proceedings, it is required that he shall appear in person. 2 Leading Crim. Cases, and authorities there cited." Young v. State, 39 Ala. 357."

Moreover, in **Frost,** the Supreme Court of Alabama said "While the question is not raised in brief of counsel for defendant, yet we deem it our duty to consider and pass upon the sufficiency of the foregoing minute entries to show the **personal presence** of the defendant, when each of the successive steps were taken, and orders made, in his case."

It is perfectly obvious that when an order was entered in the absence of Defendant, and his trial moved forward to a different date than that set on his arrignment he was denied due process and equal protection. Moreover his right to a fair and public trial was infringed upon. This Honorable Court should grant the Writ here prayed to prevent State courts from stripping the citizenry of Constitutionally protected rights in such a cavalier fashion as the Alabama Courts have indulged in the case of Gene Belcher.

III

The Alabama Criminal Court of Appeals erred in deciding that Defendant's right to be present throughout all the proceedings of his felony trial, his right to have trial proceedings stenographically reported as required by State statute, and his right to a complete record on appeal was violated when the trial court permitted proceedings on material questions to be conducted at the bench and out of the hearing of the Defendant and the official Court Reporter, contrary to: Code of Alabama, 1940, Title 13, Section 263; Sections 6 and 13, Constitution of Alabama, 1901; and Constitution of the United States, Amendments V, VI, IX, and XIV, Section 1.

Twice during the trial, proceedings were had at the Bench, out of hearing of the Court Reporter, and were not reported. (TR 38, 52).

Defendant, on his motion for new trial, made affidavit that these proceedings were out of his hearing (TR 8).

It is earnestly insisted that defendant was thus deprived of the protections due him by organic law, state and federal, wherein he is assured fair, public trial, the right to be present at that trial, and the right to have the proceedings preserved for an appeal.

Anyone who considers going "off the record" harmless should reflect on the mischief it invites. Its toleration by the Appellate Courts will permit concealment of untold error, and the invasion of every right a public trial is intended to preserve.

BLEED THROUGH

In the case sub judice, it is apparent that the matters handled "off the record" were of substance, and determinative of defendant's rights. At TR 38, the special prosecutor objected to an exhibit, the trial judge asked to see it, and then the "off the record" discussion was held at the Bench. Apparently the objection was then sustained, for defense counsel made no further reference to the exhibit and it was not received in evidence.

Similarly, at TR 51, 52 when defendant offered the same exhibit an "off the record" conference ensued at the Bench and the exhibit was not received in evidence.

The exhibit referred to was a contradictory statement previously made by the only State's witness to offer any testimony that Defendant stole any saw logs as charged. Even though this witnesses testimony was to the effect that he only "suspected" the timber he helped Defendant haul to be saw logs, rather than long-cut pulpwood to which Defendant was entitled and even though the taking to which the witness testified was not connected from the standpoint of time to the logs Slawson says he saw on January 26 at the house of Defendant's father, which logs he claimed in the indictment, the admission into evidence of Arrington's prior inconsistent statement was of the greatest materiality to the defense. The rulings of the trial court on the State's objections to the admission of this statement obviously came in the "off the record" proceedings at the Bench, thereby depriving Defendant of the opportunity to preserve the error for appellate review. This denies him due process and equal protection, for Alabama requires by statute that such proceedings be recorded by the Official Court Reporter.

In prescribing the duties of the Court Reporter, Title 13 Section 262, Code of Alabama 1940 provides:

> "he shall take **full** stenographic notes of the oral testimony **and proceedings** except argument of Counsel and note the order in which all documentary evidence is introduced, all objections of Counsel, **the rulings of the Court thereon,** and exceptions taken or reserved thereto". (emphasis supplied)

Of course, the Court Reporter must perform his functions under the direction of the Trial Judge. Perforce, it is the duty of the trial Judge to see that the Reporter performs his duties, and is given reasonable opportunity to do so.

We recognize that there are instances during the course of a trial when it is desirable or even mandatory for the proceedings to be conducted out of the presence and hearing of the jury but we respectfully suggest that this can and should be accomplished without denial to a defendant of a complete record and the right to have every stage of his trial conducted in his presence and hearing.

It is fundamental that the presence of a defendant who is charged with a felony is essential to the validity of his trial, at every stage thereof. It has been held in Alabama that a conviction will be reversed when this right has not been complied with, unless there has been a clear and unequivocal waiver by defendant. **Berness v. State,** 83 So. 3d 613, 263 Ala. 641.

A defendant is **prohibited** from waiving this right in capital cases and waiver in a non-capital case must be of an affirmative and positive nature and must be made by defendant personally. **Berness v. State,** supra.

It would be completely illogical to assert that proceedings are conducted in the presence of the defendant merely because he is in the courtroom, if the proceedings are conducted out of his hearing, so that he is unaware of what is going on. Reinforcing this contention is **Terry v. State,** 105 So. 386, 21 Ala. App. 100 which holds that it is the duty of the Court to provide means to communicate to the accused. See also **Kelly v. State,** 32 Ala. App. 408, 26 So. 2d 633 (1946).

In point is **Neal v. State,** 257 Ala. 496, 59 So. 2d 797 (1952) where reporter, clerk of the court, attorney for defendant, solicitor for the state, and the judge went into the jury room where the judge answered a juror's question and it did not appear that defendant was present in the jury room or heard what was said. In that case it was held, defendant

BLEED THROUGH

was entitled to new trial, although it was insisted by the State that "for aught that appears from the record the door of the jury room was left open and that all that was said by the court to the jury in the jury room was therefore in the hearing of the defendant".

Moreover, the recitals of the record in that case showed the defendant "being in court continuously throughout his trial".

Said the Alabama Supreme Court:

> "But again we say that we are not willing to deprive the defendant of his constitutional rights by a recital in the judgment entry when the facts as shown on the record show that he was not accorded his constitutional rights. Lynn v. State, 250 Ala. 348, 34 So. 2d 602. Substance and not form should control in a situation of this kind where constitutional rights recognized by this court as a part of the due process which should be accorded to the defendant."

Similarly in **Chaney v. State,** supra, it was held that the right is one which the accused cannot waive, **being one in which the public has an interest.**

The right of **effective** presence of Defendant at every stage of his felony trial is so fundamental that it can be waived only by him and this waiver must be clear and unequivocal. Clearly, it is a denial of equal protection for the Supreme Court of Alabama to quash its writ as "improvidently granted" when that Court had previously held in **Berness v. State**

> "(1) It is fundamental that a defendant has the right to be present at every stage of his trial for the commission of a felony. His presence is in fact essential to the validity of his trial and conviction unless there has been a clear and unequivocal waiver of this right by the defendant . . . We now deal with the method by which the defendant's clear and unequivocal right to presence at every state of trial may be waived. The great weight of authority is summed up in the simple statement found

in 23 C.J.S., Criminal Law, Section 975, Page 311: 'It is generally held that a waiver of accused's right to be present during the trial, when permitted, must be made by him personally, and that the right cannot be waived by his counsel unless accused authorizes him so to do.' "

In the case sub judice no such waiver appears and there is no waiver to the failure of the Court Reporter to record voir dire qualification of the jury or the content of the pre-trial statement of Arrington, offered but not received in evidence.

As was said in **Edwards v. United States,** 374 F. 2nd 24, cert. denied, 88 S. Ct. 48, 389 U. S. 850, 19 L. Ed. 2nd 120, ". . . it constitutes error to fail to report any portion of the proceedings in a criminal case where the unavailability of a transcript makes it impossible for the appellate court to determine whether or not prejudicial error was committed. **Parrott v. United States,** 10 Cir., 314 F. 2d 46; **United States v. Sigal,** supra; **Fowler v. United States,** 5 Cir., 310 F. 2d 66, Cf.; **Brown v. United States,** 9 Cir., 314 F. 2d 293."

Code of Alabama 1940, Title 13, Sec. 263 is almost identical to the Federal Court Reporter's Act, Title 28 USC 753 (B) (1) in requirements for reporting criminal cases, the major difference being that the Alabama statute excepts argument of counsel. Both statutes protect a fundamental incident of a fair trial, as guaranteed by the Fifth and Sixth Amendments to the Constitution of the United States. These rights have been denied Gene Belcher by the State of Alabama, in direct derogation of the holdings of this Court in **Gideon v. Wainwright, Pointer v. Texas** and **Townsend v. Sain,** supra.

We submit this reason alone is sufficiently special and important to compel the granting of the Writ, especially when it is remembered that the right we here seek to protect is one interwoven with great public interest and the practice we here denounce is widespread in trial courts, both State and Federal.

This Honorable Court ought to take the opportunity here

BLEED THROUGH

presented to stop, once and for all, the invasion by trial courts in "off the record" proceedings of the rights to public trial, to effective presence at every meaningful stage thereof, and to have a record preserved for appellate review.

IV

The Alabama Criminal Court of Appeals denied Defendant's federally protected right to a fair trial, by an impartial jury, when it affirmed the trial court in allowing the jury to separate during Defendant's felony trial without the consent of the Defendant; and Defendant was denied equal protection of the law when State decisions require a new trial if Defendant shows such separation by written affidavit and the State fails to establish that no influences were exerted which may have biased the deliberations of the jury.

In Alabama, it is error to reversal if the jury is allowed to separate in a felony trial unless the State can conclusively prove that no **influences** were exerted which **may** have biased the deliberations of the jury. The Alabama Criminal Court of Appeals held that the State met that burden in the case sub judice citing **Palmore v. State,** 283 Ala. 501, 218 So. 2d 830. However, Judge De Carlo merely paid lip service to **Palmore,** supra, and did not apply the rule laid down in that case.

The fact of separation is, prima facie, error to reversal, and Palmore established two requirements to rebut the presumption of error. First, the State must prove "that the jurors conversed with no one affecting the prisoner's guilt". In the case sub judice, the State failed to meet this portion of its burden, for as we have pointed out two or more jurors could not and did not testify that they had conversed with no one affecting Defendant's guilt. They simply could not remember what they said and did during the separation.

Moreover, the State wholly failed to meet the second requirement for rebuttal found in **Palmore:**

> "And that no other influences were exerted which **may** have biased their deliberation . . ."

As we have pointed out in detail in the Statement of the Case, the jurors mixed and milled during their separation with the prosecutor Slawson and others likely to influence them through any means by which man can communicate. Most of the jurors were friends or acquaintances of long standing of the prosecutor and his family.

With the possible exception of two or three jurors, the State wholly failed to meet the second portion of its burden, for the scope of the judge's inquiry on behalf of the State was limited, by and large, as to whether the jurors had **conversed** with anyone affecting Defendant's guilt. The many other ways of communicating or influencing were not covered by the State, and the trial judge so severely limited the Defendant on cross-examination of the jurors that Defendant was not permitted to inquire as to whether the long standing acquaintance and friendship of most of the jurors with the prosecutor and his family was brought into play to influence the jury, or any one of them.

In deciding, "after a close examination of the entire record of this hearing, we find the State did meet its required burden", the Criminal Court of Appeals, while paying lip service to Palmore, entirely ignored or failed to decipher and follow the rule laid down for rebuttal.

At the same time, the Court of Criminal Appeals ignored the well settled law of other cases on this point, including some well written opinions emanating from that Court. As it said in scholarly opinion by Justice Cates in **Lee v. State,** 47 Ala. App. 548, 258, So 2d 743 (1972):

> (1, 2) We have three-well settled rules:
> First, during the trial of a felony the jury is to be kept together; Second, if the jury does separate, that fact is, prima facie, error to reversal; and Third, to overcome this presumption of error, the State has the onus of establishing that the separated juror or jurors were not subject to influence or contacts which might have swayed them in reaching the verdict.
>
> We use "might" to reflect the test of vitiating influence

BLEED THROUGH

laid down in Roan v. State, 225 Ala. 428, 143 So. 454 (26), i. e. ::not that it **did** influence a member of the jury to act without the evidence, but that it **might** have unlawfully influenced that juror and others . . .". See Oliver v. State 232 Ala. 5, 166 So. 615. In Mitchell v. State, 244 Ala. 503, 14 So. 2d 132 (3) Bouldin, J. speaks of these rules as: ". . . safeguards against the hazards of outside contacts, which may, with no fault of the juror, so enter into his thinking as to influence his verdict unawares" See also Tidwell v. State, 37 Ala. App. 228, 66 So. 2d 845 (5), (6).

(3) In view of Tidwell, supra; Wright v. State 38 Ala. App. 64, 70 So. 2d 66, 70; Christison v. State, 39 Ala. App. 361, 103 So. 2d 52; and Smith v. State 30 Ala. App. 501, 105 So. 2d 662, we are impelled to reverse the judgment below. If Supreme Court Rule 45 were couched in terms so that we could weigh the evidence as though the jury separation had not occurred, our conclusion might be otherwise. However, the "no other reasonable jury" test is foreclosed by our Supreme Court in Rule 45. In **Oliver v. State,** 232 Ala. 5, 166 So. 615 (1936) the Supreme Court was explicit:

It is established that in their deliberation the jury should be separated from and uninfluenced by the outside world. Any misconduct that might influence the jury, affect the verdict rendered or the punishment fixed, is a cause for a new trial. The test of vitiating influence upon a jury authorizing a new trial is **not whether it did influence the jury to act without the evidence, but whether it might have unlawfully influenced the jury in the verdict returned,** as to its nature, character, or degree, or the amount and extent of the punishment fixed by the jury within the statute. The authorities on this subject are collected in Roan v. Slate, 225 Ala. 428, 435, 143, So. 454; Leith v. State, 206 Ala. 439, 443, 444, 90 So. 687; Lakey v. State, 206 Ala. 180, 182, 89 So. 605. It is settled that separation of the jury is error that is not waived by silence on the part of defendant and is not authorized even by consent of counsel. **Nelson v.**

State 253 Ala. 246, 43 So. 2d 892 (1950). Also in this case the Supreme Court ruled that the State has the burden **"to clearly show** no injury resulted from such separation". Of like efect is **Mitchell v. State,** 244 Ala. 503, 14 So. 2d 132 (1943) with a comprehensive review on the subject concluding:

"These rules are part of the law of criminal procedure sanctioned by the wisdom and experience of ages; safeguards against the hazards of outside contacts, which may, with no fault of the juror, so enter into his thinking as to influence his verdict unawares. We cannot concur in any notion then we live in an enlightened age where human nature has changed or a higher standard of conduct warrants an abandonment of safeguards written into the law because they are hoary with age.

In fact, the opportunities for contacts, as well as the means of molding public opinion on mere rumor and propaganda, are enhanced. The passion and ill-feeling among relatives and friends growing out of homicides, rapes, etc., are all here. This is not an age free from guile. Better stay by the ancient landmarks.

In passing upon the guilt or innocence of a citizen on trial for an offense involving his life or liberty, the juror is faced with a responsibility than which there is no greater among men. Charged with the finding of acts and the application of the law as given in charge by the court, any diversion which would tend to becloud his recollection of the testimony is to be avoided, so far as reasonable and practical.

Keeping the jurors together accentuates their sense of responsibility. Moreover, keeping them free from contacts which may be harmful makes for public confidence in the administration of justice, a matter not lightly to be regarded at any time."

The Alabama Appellate Courts have seen fit to deny this Defendant the protection of their own decisions. Application of the settled law in Alabama might well have obviated the

BLEED THROUGH

necessity for invoking the jurisdiction of the United States Supreme Court, but this Defendant has been denied equal protection, due process and a fair and public trial. Surely, denial to this citizen of the benefit of the well reasoned decisions of the Alabama Appellate Courts with regard to the separation of the jury should of itself be regarded as a special and important reason for the granting of remedial writ by this Honorable Court.

CONCLUSION

Defendant was not accorded the fundamental rights incident to a fair trial. He was snatched up and put to trial a day earlier than his case was set upon his arraignment, contrary to the organic law and the express provisions of statute. He was convicted by a jury, not of his peers, but made up largely of long time friends and acquaintances of the prosecutor and his famly, who could be calculated to share the prosecutor's suspicion, surmise and conjecture.

It is hard to imagine a more fertile ground for the seeds of suspicion to fall upon than this jury disclosed itself to be under cross-examination on the Motion for New Trial even when Defendant was hamstrung by the ruling of the trial judge prohibiting him from pursuing in detail the relationship between the prosecutor and the majority of the jurors.

While trial counsel may have been less than diligent in making inquiry of the venire as to their relationship with the prosecutor, this does not excuse the trial judge for allowing the jury to separate; nor does it excuse the Alabama Criminal Court of Appeals from its duty to require the State to meet with full measure of proof the burden cast upon it by the wise and long standing decisions of Alabama.

The evidence in this case fails to show that any logs were ever stolen from the prosecutor or, if they were, that the Defendant took them. The submission of the case to the jury, over Defendant's motion to exclude, and a conviction on this record which substitutes surmise, suspicion and bias for evidence must not be allow to stand.

That the Court of Appeals did affirm such a conviction must shock the judicial conscious of this Honorable Court. Certainly, it cries out for review, contrary as it is to the prior decision of this Court, as well as the Court of Appeals itself.

The observant and imaginative mind of Victor Hugo could hardly pen a clearer justice miscarriage than is contained in the record of this case, wherein a working man, without influential friends, is to be taken from his family and imprisoned at hard labor by a clique to satisfy the suspicions and animosity of one of their friends.

The organic law of this State and Nation came into being to avoid, insofar as it is humanly possible, this very kind of treatment and the power to review the decisions of state courts reposes in the Supreme Court of the United States substantially for the same salutory purpose. If ever a case cried out for the attention of this Court, this surely must be one of them. The fact that the trial judge is the brother of the Governor of Alabama, to whom the author of the opinion we seek to review owes his appointment to the Bench (as do several others on both Alabama Appellate Courts) is all the more reason for close scrutiny.

We respectfully pray: Let the Writ of Certiorari issue.

PRAYER

Wherefore, in consideration of the foregoing special and important reasons, the petitioner respectfully prays that Writ of Certiorari shall issue directed to the Alabama Court of Criminal Appeals and that this cause will be reviewed by this Honorable Court pursuant to the exigencies thereof.

Respectfully submitted,

GEORGE E. TRAWICK
Post Office Box 47
Ariton, Alabama 36311
Phone (205) 762-2356
Attorney for Petitioner

March 12, 1976

BLEED THROUGH

PROOF OF SERVICE

I, George E. Trawick, a member of the Bar of the United States Supreme Court do hereby certify that I have served the foregoing Petition on Hon. William Baxley, Attorney General of Alabama, and attorney of record for the State in this cause by mailing same to him by United States Mail, first class postage prepaid, addressed to him at his office in the Capitol, Montgomery, Alabama on this 12 day of March 1976.

George E. Trawick
Attorney for Petitioner

BLEED THROUGH

APPENDIX "A"

MARCH 18, 1975

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1974-75

Gene Belcher

v.

State

Appeal from Barbour Circuit Court

DeCARLO, JUDGE

Larceny; three years.

The Grand Jury of Barbour County, charged that Gene Belcher ". . . feloniously took and carried away timber to-wit: saw logs a further description of same being unknown to the Grand Jury; being of the total and combined value of, to-wit: $500.00; the personal property of Guice Slawson . . ."

Guice Slawson, manager of Midway Lumber Co., Inc., Louisville, Alabama, contracted with appellant to cut timber at the rate of $40. per thousand. Stumpage was to be paid only when tracts were obtained by appellant.

In the latter part of September or early October, 1973, appellant started cutting on a tract Slawson had acquired from Catherine Davis, situated behind Hubert Tyler's store on Blue Springs Highway. Before Christmas, 1973, Belcher was cutting timber behind Slawson's house and was paid $30. per thousand. Slawson explained the rate was different because he loaded the logs and not Belcher.

Around December 27, 1973, Belcher returned to cutting timber on the Davis place, and according to Slawson, appel-

lant's equipment remained in the woods where the operation continued until January 26, 1974.

On Monday, December 31, Belcher requested money to pay his men, and Slawson gave him $150. During this time Belcher commented he had been unable to haul timber due to rainy weather but had piled the logs already cut.

The week before January 26, 1974, Slawson noticed approximately 5,000 feet of logs piled behind the house of appellant's father and estimated their worth at about $500. He recognized the logs as those being cut off the Davis place. He admitted the logs had no distinguishing marks but were the same kind of pine.

Slawson testified he could not identify logs at a mill as coming from a particular tract but did recognize the logs in question as being from the Davis place. Although he could not absolutely swear they were the same, he maintained they were similar in appearance to those Belcher was unloading.

Slawson further stated the logs were not piled behind the home of appellant's father before Christmas. He was aware, however, there wasn't enough money coming in for the timber he knew to be there.

On January 26, 1974, Slawson confronted appellant about the logs beside his father's place and was told they were bought from Henry Chambers, his foreman. Slawson testified he knew the timber on Chambers' land was cut in 1972, and further, in August, 1973, Slawson had cut and moved the timber on the tract belonging to appellant's father.

During the trial a letter addressed to Slawson from Ralph Reynolds of the Jones-Reynolds Lumber Co., Abbeville, Alabama, was introduced into evidence. It listed these purchases of lumber and pulpwood from appellant:

"Dec. 28, 1973	1555' logs
"Jan. 4, 1974	1217' logs
"Jan. 11, 1974	2558' logs, 3.57 cords pulpwood
"Jan. 18, 1974	3920' logs."

BLEED THROUGH

In conclusion, the letter stated checks for these purchases were made to Henry Chambers with no stumpage deductions.

Slawson stated he did not authorize Belcher to make these sales, and he estimated this timber to be worth about $1,100.00.

Charles Arrington was first called by the State and testified he worked for appellant about four weeks from December, 1973, until January, 1974, hauling pulpwood to Abbeville. During his testimony, he recalled the occasion when appellant directed him to haul a load of logs from the Davis tract to the home of appellant's father. When Arrington refused, appellant responded, "just slip over and I'll carry them." Arrington stated he rode the truck to town, and Belcher drove off with the logs.

On cross-examination, Arrington admitted signing a statement written by defense counsel, reciting Arrington had not hauled any logs but only pulpwood to Abbeville, and further that Belcher did not ask him to haul logs belonging to Slawson anywhere; that Slawson was told Belcher was going to haul logs to the home of appellant's father, but Belcher was to buy them; and Arrington never hauled any logs because Belcher didn't buy them.

Arrington acknowledged he could not read and that the statement was read to him by defense counsel.

Later appearing as a defense witness, Arrington's testimony reaffirmed the signed statement. On cross-examination, he recanted and admitted riding with Belcher when logs from the Davis place were taken to the home of appellant's father.

When defense counsel specifically asked if the load was pulpwood, Arrington replied, "I didn't pay no attention to whether it was pulpwood or logs. I suspect it was logs."

State's witness, Henry Chambers testified he worked for appellant as foreman from right after Christmas, 1973, until the end of January, 1974. During this time Chambers did not cut any of his own timber nor sell any to appellant.

Chambers stated they moved onto the Davis place right after Christmas, but did move to Belcher's place on one occasion and then returned. The four checks drawn on Jones-Reynolds Lumber Co. were brought to him by appellant. After cashing the checks, Chambers would pay the men and give the balance to appellant who then paid Chambers.

On cross-examination he stated he did not know where the logs were coming from that were sold in his name.

Appellant testified that he cut timber on his father's place in September and October, 1973, and ramped it below the house. Logs remained there two to three months and could not be seen from the road. Belcher explained that loads of these logs were sold in Henry Chembers' name for several different reasons: (1) to keep Slawson's money separate (2) to save on taxes and (3) to provide for payroll expenses. After appellant began cutting timber on the Davis place around August or September, 1973, he moved on and off about three or four times. Belcher further explained that Slawson did not get all of his father's timber, but only about 15 acres. Appellant denied taking any logs from the Davis place to his father's house or directing Arrington to. He further denied taking any logs to Jones-Reynolds Lumber Co., but admitted carrying pulpwood, which under his agreement with Slawson, he could sell to anyone.

Belcher admitted when Slawson reduced the price of logs from $40. to $30. per thousand it made him mad and he stated he would get even.

He explained that "I owed him some money and I was going to pay him and get even with him by quitting."

I

Counsel for appellant maintains the court erred in overruling his motion to exclude the state's evidence.

In **Meadows v. State,** 36 Ala. App. 402, 56 So. 2d 789, this court held:

". . . Larceny is the felonious taking and carrying away of personal property of another with the intent on the

BLEED THROUGH

part of the taker to convert it to his own use, or to deprive the owner thereof. The offense involves a trespass on the possession of another. Ludlum v. State, 13 Ala. App. 278, 69 So. 255; McKinney v. State, 12 Ala. App. 155, 68 So. 518; Kramer v. State, 16 Ala. App. 456, 78 So. 719; Weldon v. State, 17 Ala. App. 68, 81 So. 846. "If a person acquires the possession of personal property tortiously, and thereafter forms the intent and executes the purpose to convert it, he may be guilty of larceny."

In the case before us we have substantially summarized all of the facts submitted to the jury, and there appears to have been factual issues from which a jury could infer larceny.

For this reason, we will not disturb the verdict.

II

In the instant case, appellant was arraigned on February 13, 1974, and after his plea of not guilty the court set the case for trial on March 5, 1974.

Appellant now insists he was denied due process when the court without his consent or knowledge moved the trial date to March 4, 1974.

Counsel argues this was in contravention of Title 15, Section 316, Code of Alabama, 1940, which provides:

"It is the duty of the clerk of the circuit court to set for trial all criminal cases in his court, except capital cases, and cases of parties in custody, for particular days; **and no case so set shall be called for trial before such day.**" (Emphasis ours)

Addressing a similar issue in **McDaniel v. State,** 97 Ala. 14, 12 So. 241, Justice Head commented:

"If there was an irregularity in setting this cause down for trial, as appellant's counsel contends, it was waived. Appellant went to trial without insisting upon the irregularity and can not now, for the first time, he (sic) heard to complain of it."

It is our judgment that what Justice Head stated is applicable here, and in the absence of some adverse ruling to the appellant's cause, we have nothing to review.

III

Next it is contended that twice during the trial, proceedings were held outside the hearing of appellant and the court reporter.

Counsel insists appellant's right to be present throughout all the proceedings of his trial was violated when the court did not assure that such proceedings were being preserved.

In 23 C. J. S. Criminal Law, Section 974, we find the following comments on this point:

> ". . . The exclusion of accused during conference of court and counsel on questions of law, at the bench or in chambers, has been considered not to constitute a denial of the right of accused to be present at every stage of the trial,"

The bench conferences complained of were participated in by appellant's counsel along with the state's attorney, and Belcher was always present in the courtroom. No objection was interposed, therefore, we do not believe he can now complain of any possible prejudice. **Steiner v. U. S.,** 134 F. 2d 931; **Wade v. State,** 49 Ala. App. 601, 274 So. 2d 626.

IV

During the trial the jury was allowed to separate without consent of the appellant. This fact was later assigned as a ground for appellant's motion for a new trial and after an evidentiary hearing on this point, the motion was overruled. Appellant now asserts this as error, and argues the state failed to show no injury resulted from the separation.

In Alabama, one of the leading cases on this point is **Palmore v. State,** 283 Ala. 501, 218 So. 2d 830. There Justice Coleman cited this prevailing rule:

". . . (T)hat a separation of the jury, after the trial has

been entered upon and before verdict, creates a cause for reversible error in favor of defendant unless the state affirmatively shows that defendant was not injured thereby. Lynn v. State, 250 Ala. 384, 386, 34 So. 2d 602.

"Such separation pending a trial is not necessarily ground for a new trial but is sufficient to show a prima facie right to it, and the burden is upon the state, after such separation is shown, to prove that the jurors conversed with no one affecting the prisoner's guilt and that no other influences were exerted which may have biased their deliberations . . ."

On the motion for a new trial before us, testimony was taken from the twelve jurors participating in appellant's trial. Each juror testified no one spoke to him about the case. On cross-examination however, two of the jurors said they did not remember discussing the case with anyone.

After a close examination of the entire record of this hearing, we find the state did meet its required burden.

No error appears in the record.

AFFIRMED.

All the Judges concur.

APPENDIX "B"

JUDGMENT

On the date of the trial in this cause, March 4, 1974, upon receipt of the jury verdict finding the defendant guilty as charged, the charge being Grand Larceny, the Court deferred sentencing pending receipt of a pre-sentence report.

Comes now the State of Alabama, by its Deputy District Attorney, and the defendant in his own proper person and by attorney, and upon consideration of the verdict of the jury and of the evidence introduced upon the trial of the case, the Court is of the opinion that the defendant is guilty of the ofense of grand larceny as charged in the indictment and in accordance with the verdict of the jury in this case. Thereupon, the defendant was asked in Open Court by the Court if he had anything to say why the sentence should not now be pronounced upon him, and he said nothing. It is, therefore, considered and adjudged by the Court that the said defendant, Gene Belcher, be, and he is hereby adjudged to be guilty of the offense of grand larceny. It is further considered and adjudged by the Court that the said defendant, Gene Belcher, be, and he is hereby sentenced to imprisonment in the penitentiary of this State for a period of three (3) years from this date.

The defendant gives notice of appeal and sentence is hereby suspended pending appeal. Appeal bond is fixed at two thousand dollars ($2,000.00).

Dater this the 9th day of May, 1974.

/s/ Jack W. Wallace

Judge 3rd Judicial Circuit of Alabama

Filed in Office this 9th day of May, 1974.

/s/ David S. Nix

Clerk

BLEED THROUGH

APPENDIX "C"

TO THE HONORABLE JACK W. WALLACE, CIRCUIT JUDGE:

Comes now the Defendant, GENE BELCHER, by his attorneys, and respectfully moves for a new trial in this cause, assigning as grounds therefor the following, separately and severally:

1. The trial of Defendant was called for trial before the particular day on which it had been set in contravention of Title 15, Section 316, Code of Alabama of 1940.

2. For that on February 13, 1974, the Defendant was arraigned, entered a Plea of Not Guilty, and his trial was set at that time for March 5, 1974, and said trial was called, had and conducted, before such date, to wit: on March 4, 1974.

3. For that Defendant was denied due process of law and equal protection of the law under the Constitutions of the State of Alabama and the United States of America in this: he was arraigned on February 13, 1974, at which time his case was set for trial on March 5, 1974, but notwithstanding, his trial was called before such day, and prior to Defendant having completed his preparation for said trial and Defendant was deprived of the time allowed at his arraignment for the preparation of said trial, to his detriment.

4. The Court failed to charge the jury that the jury might find the Defendant guilty of an attempt to commit the offense alleged.

5. The Court failed to charge the jury as to the law regarding attempt as required and provide by Title 15, Section 323, Code of Alabama of 1940.

6. For that the trial court erroneously excluded from the consideration of the jury, the lesser offense of an attempt: **Stovall vs. State,** 34 Ala. App. 610 42 So. (2d) 636.

7. For that it was error to provide the jury with forms for their verdict and to exclude therefrom or omit to provide a form for an attempt verdict.

8. For that the Defendant was denied due process of law, equal protection of the law, and a fair and impartial trial, as guaranteed him by the constitutions of the State of Alabama and of the United States of America in this: the jury was not charged on the law regarding an attempt and was not provided with a form for any verdict finding an attempt, although the jury was provided forms for a conviction of grand larceny and petit larceny.

9. For that the Defendant was not present in Court when an Order was made fixing the date for his trial.

10. For that no copy of the indictment was served on Defendant.

11. For that the Defendant was denied due process of law and equal protection of the laws under the statutes and constitutions of the State of Alabama and of the United States of America in that he was not served with a copy of the indictment.

12. For that the Defendant was denied due process of law and equal protection of the laws under the statutes and constitutions of the State of Alabama and of the United States of America in that he was not present in Court when his case was set for trial on the date the trial was actually held.

13. Defendant was and is unlawfully sentenced in that no judgment of conviction has been rendered against him.

14. For that the jury was allowed to separate during the trial: **McCarty vs. State,** 35 Ala. App. 201, 45 So. (2d) 175.

15. For that the jury was allowed to separate during the trial without the consent of the Defendant: **Nelson vs. State** 253 Ala. 246, 43 So. (2d) 892.

16. For that it was error for the Court to allow and receive in evidence State's Exhibit No. 1, a letter from Ralph Reynolds, as direct evidence of the matters and things set out therein, without the appearance of the said Ralph Reynolds as a witness.

BLEED THROUGH

17. For that it was error to allow the witness, GUICE SLAWSON, to testify as to his interpretation of said Exhibit 1, the author thereof not having testified as a witness, and the Exhibit having not been connected up, removed from the purview of the hearsay rule, or otherwise made delevant and admissable.

18. For that it was error to allow into evidence and for the consideration of the jury said letter purportedly from Ralph Reynolds, State's Exhibit No. without said witness confronting the Defendant, and without allowing the Defendant the opporeunity of cross-examination of said witness.

19. For that it was a denial of due process, equal protection of the law a fair and impartial trial, and the right to be confronted by the witnesses against him, as guaranteed to the Defendant by the laws and constitutions of the State of Alabama and the United States of America to receive in evidence said Exhibit No. 1. and allow the jury to consider the same, and the witness GUICE SLAWSON, to testify as to his interpretation thereof.

20. For that the witnesses who testified for the State were not duly and regularly sworn as witnesses in this particular case prior to their giving testimony herein.

21. For that there is a variance between the proof and the allegations of the Complaint.

22. For that the allegations of the Complaint are not sustained by the proof.

23. For that if any offense is proven by the evidence, it is embezzlement, and not larceny as charged in the indictment.

24. For that it was error to fail to grant Defendant's motion to exclude the evidence.

25. For that it was error to allow the case to go to the jury on the uncorroborated testimony of an alleged accomplice.

26. For that it was error to fail to charge the jury as to the law on accomplices.

27. For that it was error to allow the case to go to the jury when the offense alleged in the indictment had not been proven.

28. For that the State failed to meet its burden of proof that the alleged stolen logs were the personal property of GUICE SLAWSON.

29. For that it was prejudicial error for the prosecution to cross-examine the Defendant with reference to alleged convictions of worthless checks without any proper predicate having been laid, and without showing that the alleged convictions, and each of them, were for a crime involving moral turpitude.

30. For that it was error to submit the case to the jury when the State had failed to prove that GUICE SLAWSON had title or possession of the alleged stolen property.

31. For that it was error to charge the jury with reference to offenses involving moral turpitude or prior felonies allegedly committed by the Defendant when there was no proof that the Defendant had in fact committed any prior felony.

32. For that it was error to charge the jury with reference to offenses involving moral turpitude or prior felonies alledgedly committed by the Defendant when there was no proof that the Defendant had in fact committed any prior felony or crime involving moral turpitude.

33. For that it was error for the Court to conduct or permit to be conducted parts of the trial out of the hearing of the Court Reporter, and without requiring the Court Reporter to listen to and report the same.

34. For that it was error for the Court to allow part of the trial to be conducted out of the hearing of the Defendant and the Court Reporter and without requiring the Court Reporter to listen to and report the same.

35. For that it was a denial to the Defendant of a fair trial, due process and equal protection of the law, as guaranteed by him by the laws and constitutions of the State of Alabama and the United States of America for the Court to conduct parts of the trial out of the hearing of the Defendant

BLEED THROUGH

and the Court Reporter and without requiring the Court Reporter to report the same.

Respectfully filed this the 5th day of June, 1974.

JOHN D. PATTERSON
GEORGE E. TRAWICK
Attorneys for Movant

by /s/ George E. Trawick
1205 Old Fort Rucker Road
Post Office Box 1163
Ozark, Alabama 36360

AFFIDAVIT

STATE OF ALABAMA

COUNTY OF DALE

Before me, the undersigned Notary Public, in and for said county and state, personally appear GENE BELCHER, who is known to me, and who being by me first duly sworn, deposed:

1. My name is GENE BELCHER, and I am the Defendant in this case.

2. During the trial of this case, the jury was allowed to separate from shortly before 12:00 o'clock noon until about 1:00 p.m. on the day of the trial and during the trial. I was not asked to consent to the separation of the jury, and I did not give my consent thereto.

3. During the course of the trial several conferences were held before the judges bench by the judge and the attorneys. I was not requested to approach the bench where I might hear what was said and done in these conferences and I did not hear what was said and done in these conferences. I was not asked to give nor did I give my consent to any portion of the trial being conducted out of my hearing or presence.

Further, Affiant saith naught.

/s/ Gene Belcher

GENE BELCHER

Sworn to and subscribed
before me this 5th day
of June, 1974.

/s/ Kenneth R. Cain

Notary Public

ORDER OF COURT

The foregoing Motion for New Trial having been presented, the same is continued and set for hearing on the.... day of ....., 1974.

DONE AND ORDERED this the .... day of June, 1974.

CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion and Order endorsed thereon upon Hon. Ben C. Reeves, District Attorney, Eufaula, Alabama, Hon. Sam A. LeMaistre, Assistant District Attorney, Eufaula, Alabama, and Hon. William H. Robertson, Special Prosecutor, Court Square, Clayton, Alabama, being all of the attorneys of record for the State of Alabama in this case, by mailing postage prepaid to each of them at their respective offices, a true copy thereof on this the .... day of June, 1974.

GEORGE E. TRAWICK
of counsel for Movant

BLEED THROUGH

APPENDIX "D"

Q All right. Now, I want to show you this statement and ask if you can identify it?

MR. ROBERTSON: Your Honor—

THE COURT: (Interposing) He is your witness now, you know.

MR. ADAMS: Right. Can you identify it?

WITNESS: Yes, sir.

MR. ADAMS: All right. I want to introduce this, Your Honor (Indicating).

(THEREUPON, a one-page document was marked for purposes of identification as Defendant's Exhibit "A".)

(THEREUPON, a short discussion was held at the Bench between counsel and the Court out of the Reporter's hearing and was not reported.)

MR. ADAMS: Now, do you remember back to sometime, approximately, around Christmas, the best we can determine, where Gene Belcher stated to you that you all were going to haul some logs or you, particularly, were going to haul some logs to his daddy's house?

MR. ROBERTSON: I'm going to object to that, Your Honor.

WITNESS: Yes.

THE COURT: Sustained. Now, just a minute, please. When they make objections you wait a minute before you answer them — before you answer the questions. I'll tell you when to answer and don't answer until I tell you.

WITNESS: Yes, sir.

MR. ADAMS: Did Gene Belcher tell you to haul some logs to—

MR. ROBERTSON: (Interposing) He is your witness now, William, and—

MR. ADAMS: (Interposing) I'm just asking him a question as to—

MR. ROBERTSON: (Interposing) You put him on as your witness and you are leading.

MR. ADAMS: All right. Did you or did you not haul any logs to Gene Belcher's house?

WITNESS: No, sir.

Q (Mr. Adams continuing) You did not?

A. (Witness continuing) I did not.

Q All right. Have you ever hauled any logs to Abbeville?

A. No, sir.

Q Have you hauled any pulpwood to Abbeville?

A. Yes, sir.

MR. ADAMS: All right; that is all.

APPENDIX "D"

RECROSS-EXAMINATION

BY MR. ADAMS:

Q Charlie Wayne, on that day did you not have this statement read to you on — — on Saturday, March 2nd?

A. Yes, sir; I had it read to me.

Q Who read it to you?

A. You did.

Q All right. Did you also sign the statement down here, after I read it to you, "I cannot read but this statement has been read to me by William J. Adams, Jr., and it is true to the best of my knowledge"?

A. Yes, sir.

Q And you have seen that statement—

A. (Interposing) Yes, sir.

Q —and that was read to you?

A. Yes, sir.

Q All right. Now, did you also say on that day that "Guice told me that he would pay me for . . ."—

MR. ROBERTSON: (Interposing) Just a minute. Your Honor, I'm going to object to—

THE COURT: Let's see it.

(THEREUPON, a short discussion was held at the Bench between counsel and the Court out of the hearing of the Court Reporter and was not reported.)

MR. ADAMS: That is all, Your Honor.

THE COURT: All right. You can come down. Thank you.

(THEREUPON, the witness was excused from the witness stand.)

APR 7 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1322

GENE BELCHER,
PETITIONER,

VS.

STATE OF ALABAMA,
RESPONDENT.

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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COUNSEL FOR RESPONDENT

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I.

OPINION OF THE COURT BELOW

Gene Belcher v. State, 56 Ala. App. ——, 325 So. 2d 195, 4th Div. 318, March 18, 1975. Rehearing denied April 22, 1975. Certiorari quashed by the Supreme Court of Alabama as being improvidently granted, January 9, 1976, 325 So. 2d 199.

II.

JURISDICTION

The petitioner has applied for a writ of certiorari from the Supreme Court of the United States to review the opinion

of the Court of Criminal Appeals, dated March 18, 1975. Petitioner applies under the provisions of Title 28, Section 1257, U.S.C.A.

III.

QUESTIONS PRESENTED

1. Should certiorari be granted to review the evidence and discuss facts?

2. Is decision of State Trial Court denying motion for new trial subject to review by this Court?

3. Did Petitioner show he suffered substantial prejudice to his rights by the trial court exercising its discretion to relax procedural rules in setting his case for trial one day prior to original setting?

IV.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

V.

STATEMENT OF THE CASE

Petitioner was indicted, tried, and convicted of grand larceny and sentenced to three years in the penitentiary. He appealed and the Court of Criminal Appeals affirmed holding evidence was sufficient to sustain conviction; that if there was any irregularity with respect to trial court's moving trial date to a day prior to date set at time of arraign-

BLEED THROUGH

ment, such was waived by defendant's conduct in going to trial without insisting upon the irregularity; that defendant could not complain for the first time on appeal of possible prejudice caused by holding bench conferences outside hearing of defendant and court reporter; and that the State established that no injury resulted from the separation of the jury during trial without defendant's consent.

VI.

SUMMARY OF ARGUMENT

Certiorari is not granted to review evidence and discuss specific facts.

Decision of State trial court denying motion for new trial, said decision resting within the sound discretion of the court is not reviewable by this Court.

It is always within the discretion of the trial court to relax or modify its procedural rules when in a given case the ends of justice require it. Such action is subject to review only upon a showing of substantial prejudice to the complaining party.

VII.

ARGUMENT

Most of the allegations of petitioner have to do with sufficiency of the evidence and type of evidence presented.

This Honorable Court in the case of *United States v. Johnson*, 69 L. Ed 925, in an opinion by Mr. Justice Holmes, held:

"We do not grant a certiorari to review evidence and discuss specific facts."

The Court of Criminal Appeals of Alabama in *Moore v. State*, 52 Ala. App. 179, 290 So. 2d 246 held that the decision on motion for new trial rests largely within the sound discretion of the trial court and in reviewing the decision, the Court of Criminal Appeals will indulge every presumption in favor of correctness thereof.

Petitioner claims this is error.

However, this Honorable Court in *Wolfe v. North Carolina*, 364 U.S. 177, 80 S. Ct. 1482, 4 L. Ed. 2d 1650, in a similar case, held that under North Carolina law, a motion to set aside a verdict and grant a new trial is addressed to the discretion of the court and its refusal to grant such motion is not reviewable on appeal.

Respondent submits that denial of motion for new trial, like the question of sufficiency of evidence, does not present a federal question for review.

Petitioner argues that there was reversible error committed when the court allowed the jury to separate for lunch.

The rule is set out in *Palmore v. State*, 283 Ala. 501, 218 So. 2d 830 as follows:

"Such separation pending a trial is not necessarily grounds for a new trial but is sufficient to show a prima facie right to it, and the burden is upon the state, after such separation is shown, to prove that the jurors conversed with no one affecting the prisoner's guilty and

BLEED THROUGH

that no other influences were exerted which may have biased their deliberations. . . ."

The State met this burden in the evidence taken at the motion for new trial. Each juror was questioned and *none* had discussed the case with anyone or had anyone discussed it with them during the time the jury was separated. Petitioner seeks to infer that some were not sure but a reading of the record of the motion for new trial (return pages 1 through 45) disproves his allegation.

Both the matter of setting up trial date one day early and the fact that attorneys approached the bench were matters of State procedure. They were not objected to at trial and are deemed waived.

This Honorable Court has consistently held that where State procedural rules, as here, were relaxed or modified by the State Court, such case is not reviewable except upon a showing of substantial prejudice. Such was not shown here.

The general rule above enunciated was set out in *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 90 S. Ct. 1288, 25 L. Ed 2d. 547 thusly:

> "It is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it; the action of either in such a case is not reviewable except upon a showing of substantial prejudice to the complaining party."

Respondent submits that no substantial rights of the accused were prejudiced and that no Federal question is pre-

sented for review. Respondent respectfully asks this Honorable Court to examine Appendix A of petition, the opinion of the Court of Criminal Appeals of Alabama. Respondent adopts it into his brief as it covers all points raised by Petitioner.

VIII.

CONCLUSION

For the foregoing reasons, respondent submits that no constitutional rights of petitioner were violated. Therefore the writ of certiorari in this case should be denied.

Respectfully submitted,

WILLIAM J. BAXLEY
Attorney General of Alabama

DAVID W. CLARK
Assistant Attorney General
of Alabama

COUNSEL FOR RESPONDENT

IX.

CERTIFICATE OF SERVICE

I, David W. Clark, one of the attorneys for respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5 day of April, 1976, I served a copy of the foregoing brief and argument of respondent in opposition to petition for writ of certiorari upon the the attorney for petitioner, by mailing a copy in a duly addressed envelope to said attorney of record, as follows:

Honorable George E. Trawick
Attorney at Law
P.O. Box 47
Ariton, Alabama 36311

DAVID W. CLARK
Assistant Attorney General
of Alabama

State Administrative Building
Montgomery, Alabama 36130

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1322

GENE BELCHER, Petitioner

V.

THE STATE OF ALABAMA, Respondent

PETITION FOR REHEARING

ON

PETITION FOR A WRIT OF CERTIORARI

To the Alabama Court of Criminal Appeals

GEORGE E. TRAWICK
Post Office Box 47
Ariton, Alabama 36311
Phone (205) 762-2356
Attorney for Petitioner

May 18, 1976

HOUSTON PRINTING COMPANY, DOTHAN, ALABAMA 36301

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Comes now the petitioner, Gene Belcher, by his undersigned attorney, and respectfully petitions for a rehearing, in accordance with Supreme Court Rule 58, and states as grounds therefor the following intervening circumstance of substantial or controlling effect:

1. A controlling dispositive question raised on the petition for writ of certiorari was "Whether the Alabama Court of Criminal Appeals erred in deciding Defendant was not denied due process of law when the trial court, without Defendant's consent or knowledge, moved his trial date up from March 5, 1974, on which it had been set at his arraignment, to March 4, 1974, contrary to the requirements of: Title 15, Section 316, Code of Alabama, 1940; Sections 6 and 13, Article 1, Constitution of Alabama of 1901; and Constitution of the United States, Amendments V, VI, IX, and XIV." (pages 2-3, 28-33, of the Petition For A Writ Of Certiorari).

2. In the decision sought to be reviewed, entered on March 18, 1975, the Alabama Court of Criminal Appeals held, in writing to this question, that the irregularity was waived by failure to raise at trial (page 5a, Appendix to The Petition for Writ of Certiorari).

3. Exactly one year later, on March 18, 1976, and after the petition sub judice was filed, the case of **Joiner V. State** was reported at 326 So. 2d 705, Advance Sheet 3. The Court of Criminal Appeals of Alabama held in this decision, which was entered February 3, 1976, "if arraignment occurs at a court session before trial date, counsel's presence is mandatory at each session beginning with arraignment unless the

cause is continued for attendance of counsel . . .," citing as authority **Perkins v. State,** 281 Ala 139, 199 So 2d 839; **Merritt v. State,** 50 Ala. App. 635, 282 So. 2d 74. The cited cases are authority for the necessity of counsel appearing at arraignment only. Thus, in **Joiner,** the Court of Criminal Appeals of Alabama has now extended and **made mandatory** the requirement that counsel must be present at arraignment to include **all subsequent proceedings** in a felony prosecution. Accordingly, since the entry of the decision in the case sub judice, the Court of Criminal Appeals of Alabama has moved from the position of holding the entry of an order changing the trial dates as set on arraignment in the absence of defendant and his attorney is waived unless objected to at trial to now holding that presence of counsel at the arraignment and each session thereafter is mandatory, except to enter continuances because of the absence of counsel.

4. Also, In **Joiner,** supra, the Court of Criminal Appeals of Alabama reviewed the entire record of the case then before it and the effect of its decision is that the record must reflect the presence of counsel at each session beginning with and after arraignment. The sub judice record does not reflect the presence of either the petitioner Belcher or his counsel at the time the date of his trial was moved up from the date upon which it had been set at his arraignment, without his knowledge or consent, and the State in its brief did not contest the fact that there was no such presence.

5. It is believed and insisted by petitioner, therefore, that **Joiner,** supra, is an intervening circumstance of substantial or controlling effect within the meaning and in accordance with the examples reflected in Supreme Court Rule 58 (2).

BLEED THROUGH

6. Clearly, in the case sub judice, the State Court has decided a Federal question of substance in a way not in accord with applicable decisions of this Court, in that petitioner's right to counsel has been infringed upon: **Gideon v. Wainwright,** 372 U. S. 335, 9 L ed 2d 799, 83 S Ct. 792, 93 ALR 2d 733. This denial, at a crucial stage of the proceedings, at which the Court of Criminal Appeals now belatedly holds the presence of counsel mandatory, denied petitioner due process, equal protection and the right to a complete transcript on appeal contrary to **Edwards v. United States,** 374 F 2d 24, certiorari denied, 88 S Ct. 48, 389 U. S. 850, 19 L. ed. 2d 120. In its brief, the State of Alabama contended that these rights had been waived, and the State Court had so held. Now, in the intervening **Joiner** decision, the right to presence of counsel at the session where the date of defendants trial was changed has been held mandatory in Alabama, bringing the procedural decisions in Alabama back in line with the requirements of the organic law and previous Alabama decisions the protection of which petitioner insisted upon but has been denied in the case sub judice.

7. We respectfully submit that the **Joiner** decision is such an intervening circumstance as to entitle petitioner to rehearing on this question, and we respectfully pray that a rehearing be granted to the end that petitioner will be given the protection of this subsequent case.

Respectfully submitted this the 18th day of May, 1976.

George E. Trawick,
Attorney for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify, in compliance with Supreme Court Rule 58, that the foregoing petition is presented in good faith and not for delay and that the petition is restricted to the grounds specified in said rule.

Submitted this the 18th day of May, 1976.

George E. Trawick,
Attorney for Petitioner

PROOF OF SERVICE

I, George E. Trawick, a member of the Bar of the United States Supreme Court, do hereby certify that I have served the foregoing petition for rehearing on Honorable William Baxley, Attorney General of Alabama, and attorney of record for the State in this cause by mailing same to him by United States Mail, first-class postage pre-paid, addressed to him at his office in the Capitol, Montgomery, Alabama, on this the 18th day of May, 1976.

George E. Trawick
Attorney for Petitioner
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